IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY & INTESTATE JURISDICTION

PETITION NO.488 OF 2000

...

Kesarbai Ramdas Laxmidas ...Deceased

v/s.

Rukshmani Ramdas & Anr. ...Petitioners

...

Ms.B.P.Jakhade for the Petitioners.

WITH

O.O.C.J.

ORIGINATING SUMMONS NO.1025 OF 2004

IN

SUIT NO.1212 OF 2004

...

Jaywanti Dawood Khalfe ...Plaintiff

v/s.

Pushpa Ramdas & ors. ...Defendants

...

Mr.D.D. Madon with Mr.Cyrus Adreshir i/b M/s.Rustomji & Ginwala for the Plaintiff.
Ms.B.P. Jakhade for Defendants Nos. 1 & 2.
Ms.Sindha sreedharan for Defendant No.3.
Mr.Rajesh Patel i/b Heneegi Modi for Defendants Nos. 4, 6 & 7.

...

CORAM: D.K.DESHMUKH, J.

DATED: 11TH AUGUST, 2006

P.C.:

1. The facts that are material and relevant for deciding these two proceedings are that the Petition No.488 of 2000 is filed by one Rukshmani Ramdas Bhatia and Tarla Ramdas Matani, as executors named in the Will of one Kesarbai Ramdas Laxmidas, who died on 26th March, 1995 for probate of the Will left behind by the deceased. Apart from being the executors of the Will left behind by the deceased, the Petitioners

are also daughters of the deceased.

2. One Jaywanti Dawood Khalfe, who is also daughter of the deceased had filed a caveat in the Probate Petition. There was delay in filing affidavit in support of the caveat, therefore, Chamber Summons No.1437 of 2000 was taken out by Jaywanti Khalfe. That Chamber Summons was decided by this court by its order dated 20th August, 2001. The Court found that sufficient cause for the condonation of delay in filing affidavit in support of the caveat has not been shown, therefore, the Chamber summons was dismissed and now as there was no caveat in the probate petition, the office was directed to process the probate petition in accordance with law.

3. The said Jaywanti thereafter took out originating summons. Her case in the originating summons is that apart from the Will of the deceased, there are three codicils, one dated 1-11-1980, other dated 4-8-1989 and the third dated 18-2-1990 and therefore, while issuing probate of the Will, three codicils be also taken into consideration.

4. Now, as a result of the order passed by this court in Chamber Summons No.1437 of 2000 there is no caveat in the probate petition, therefore, the Petitioners in the probate petition are entitled to the probate of the Will and there is no dispute between the parties on that. The only area of controversy is whether while granting probate of the Will, probate of the codicils is also to be granted.

5. Now, perusal of the codicils shows that so far as the first codicil dated 1-11-1980 is concerned, it is signed only by the testator and there are no attesting witnesses to that codicil. So far as second codicil dated 4-8-1989 is concerned, admittedly it is signed by the testator and by two attesting witnesses and so far as third codicil dated 18-2-1990 is concerned, it is signed by the testator and one attesting witness.

6. The learned Counsel appearing for Jayawanti who has taken out the originating summons submits that Jayawanti is admittedly a daughter of the deceased. She is also a beneficiary under the Will. She is also an heir of the deceased and therefore, under the provisions of Rule 238 of the Original Side Rules

framed by this Court she is entitled to take out this originating summons for deciding the question whether while granting probate of the Will, probate of the codicil has also to be granted by the Court.

7. It is submitted that the term "codicil" is defined by sub-section (b) of Section 2 of the Indian Succession Act, 1925 (hereinafter referred to as the Act) to mean an instrument in relation to a Will and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will. It is submitted that the three codicils form part of the Will and therefore, while granting probate, this Court will have to grant probate of the codicils. It is submitted that no doubt it is a mandatory requirement of Section 64 of the Act that a Will is to be attested by two or more witnesses and that the first and third codicils are not attested by the minimum number of witnesses, then also according to the learned Counsel appearing for Jayawanti, in view of the provisions of Section 64 because in the second codicil, which is duly attested by two witnesses, first codicil is referred to, the first codicil will be part of the second codicil and therefore the first and second codicils are valid and therefore they are

part of the Will of the testator and as they are part of the Will of the testator, probate of the Will along with first and second codicils should be granted.

8. On behalf of the original Petitioners, firstly, it is submitted that the originating summons is not maintainable. In support of this submission reliance is placed on a judgment of the learned single Judge of this Court in the case of **Rama Aziz Parpia and others, v/s. Balkrishna K. Mehta and ors., 1993 (1) Bom.C.R. 267**. It is next submitted that Jaywanti is not entitled to raise this question because it is barred by the principles of constructive res-judicata because of the order dated 20-8-2001 made in the abovementioned Chamber Summons.

9. The learned Counsel appearing for Tarla, who is Defendant in the originating summons and Petitioner in the probate petition submits that Jaywanti is opposing grant of probate of the Will and therefore, now her contention that the probate of the Will along with the first and second codicils should be granted, should not be accepted. It is submitted that it is mandatory requirement of the Succession Act that like

a Will, a codicil will also be attested by minimum two attesting witnesses. As the first and the third codicils are not attested as required by law, and as second codicil though attested by two witnesses is dependant on the first codicil, it is invalid, and therefore, none of the codicils are valid and therefore probate only of the Will should be granted.

10. There is no dispute before me that all the codicils are signed by the testator. There is also no dispute before me that the second codicil is attested by two witnesses. So far as third codicil is concerned, even after accepting the submissions made on behalf of Jaywanti, the third codicil cannot be accepted as valid because it is signed by only one attesting witness. Therefore, the question that is to be decided is firstly, whether in the second codicil the first codicil is referred to and if that is so in view of the provisions of Section 64 whether the first codicil is to be taken as a part of the second codicil? For that purpose, it is necessary first to refer to the first codicil. It reads as under:-

After making Will as above, now I make following changes and more clarification.

1) In the above para 3 (Three), it is to be clarified in respect of my flat that the name of my two daughters (A) Rukshmani and (B) Tarla are in the nomination form of the Society. Name of my third daughter Pushpa shall be added therein so that each daughter viz. Rukshmani, Tarla and Pushpa shall get the flat equally.

2) As to the shop M/s.R.L.Market in the above para four(4), I have disposed of the same now therefore, the same is not existing now.

3) In the above para 6(six), I had decided to give 1/3(One third) share to my grand-son viz. Munjal Mansing; I am now making the same as ‘Eight Anna’ that is to say he shall be given half share in the remaining property and after deducting the same the remaining 1/2 property be distributed amongst my six daughters equally.

4 After carrying out everything as above, if anything remains then I give right to my Executors to do as they deem proper for the same.

sd/- Kesarbai Ramdas

1-11-1980

11. It is clear from the above quoted first codicil that it is signed only by the testator, there are no attesting witnesses and that by that codicil the testator is making changes and giving clarifications in relation to the Will. It is to be noted that by paragraph 3 of the first codicil, the testator is referring to paragraph (6) of the Will and making changes in relation to the share to be allotted to Munjal Mansing. So far as second codicil is concerned, it reads as under:-

(a)....

This day I making additional changes as under in my Will i.e. Testament as above of my Free Will and Pleasure. On page No.3 para 3, I have decided that my grandson Munjal Mansingh

shall be given eight anna or 50% with regard to the same I now decide to give in equal share to my son Mansingh half portion i.e. to say now Munjal and Mansingh shall get in equal shares four annas or 25 percent out of the total eight annas. At the time of execution of Will if such circumstances arise that out of the two only one is living then entire eight annas that is to say total 50% shall be given to the person living eight annas of the rupee shall be given to the person living, eight annas of the rupee shall be given as above, whereas other eight annas shall be given to my six daughters in equal shares.

sd/-Kesarbai Ramdas

4-8-1989

Witnesses

sd/- P.K.Kapadia

FCA 4/8/89

sd/- (illegible)

4/8/89

12. There is no dispute that this second codicil is signed by the testator and duly attested by two attesting witnesses. It is further clear that the purpose of the second codicil is to make additional changes in the Will. The words "I am making additional changes as under in my will" in the 2nd codicil indicate that some changes in the will are already made. This is clear reference to the first codicil which makes changes in the Will. It is clearly means that the changes that are mentioned by the second codicil are in addition to the changes in the Will which are made by the first codicil. It is further clear that in the second codicil the testator is referring to paragraph 3 of the first codicil and is dealing with the share of grand-son Munjal Mansing. Thus, to my mind it is clear that in the second codicil which is duly attested, first codicil is in terms referred to. At this juncture, it will be useful to refer to the provisions of Section 64 of the Indian Succession Act. Section 64 reads as under:-

> 64. **Incorporation of papers by reference.-** If a testator, in a Will or codicil duly attested, refers to any other document, then

actually written as expressing any part of his intentions; such document shall be deemed to form a part of the Will or codicil in which it is referred to.

13. It is clear from the perusal of the above quoted provisions of Section 64 that if in a valid Will or codicil, any document is referred to, then if that document is actually written and if it contains an expression of the intention of the testator obviously regarding disposition of his property then that document is taken to be part of the Will or codicil irrespective of the fact that the document is not signed by the testator. The requirements that are necessary for valid codicil or Will are not attached by that provisions to the document which is referred to in the valid Will or codicil. Applying the provisions of Section 64 to the present case, it is clear that so far as the second codicil is concerned, it is valid codicil, it is signed by the testator as also attested by two witnesses and in that codicil the first codicil dated 1-8-1989 is in terms referred to. The first codicil is not only written but is also signed by the testator. Therefore, by application of the provisions of Section 64, first

codicil will be deemed to be part of the second codicil. Section 32(b) defines the term "codicil". It reads as under:-

> "codicil" means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will;

14. It is undisputed before me that the first codicil and the second codicil make alterations in the disposition of the property referred to in the Will and therefore, first codicil and second codicil will be deemed to be a part of the Will of which the Petitioners are seeking probate in the probate petition.

15. So far as the objection about maintainability of the originating summons is concerned, it will be useful to refer to the provisions of Rule 238 of the O.S.Rules. Rule 238 reads as under:-

> 238. **Who may apply for the issue of originating summons and in respect of what matters**:

The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative, or as beneficiary under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for such relief of the nature or kind following as may by the summons be specified and circumstances of the case may require, (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:-

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or legal representative, or beneficiary;

(b) the ascertainment of any class of

creditors, devisees, legatees, heirs, legal representatives, beneficiaries or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees and the vouching (when necessary) of such accounts;

(d) the payment into Court of any moneys in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees;

(f) the approval of any sale, purchase, compromise or other transaction.

(g) the determination of any question arising in the administration of the estate or trust.

16. Perusal of the above quoted Rule 238 shows that an originating summons can be taken by an heir or by legal representative. So far as Jayawanti is

concerned, she is admittedly heir of the deceased and she is also beneficiary under the Will. The codicil in relation to which the originating summons has been taken out affects the rights of Jayawanti as a beneficiary and heir and therefore, in my opinion, she is entitled to take out originating summons for determination of her rights as a beneficiary. So far as reliance placed on the judgment of the learned single Judge in the case of **Rama Aziz** is concerned, in that case an originating summons was taken out by some of the legetees under the Will for direction to the executors of the estate of the deceased and the court has held that such originating summons is maintainable and the court has issued direction. The question of law that is decided by the court in that judgment is that the disputed rights of the parties cannot be decided by the court by originating summons. In so far as the present case is concerned, Jayawanti who has taken out this originating summons is not asking the court to decide any of her right. Originating summons is taken out for deciding question arising in the administration of estate. Perusal of the judgment in the case **of Rama Aziz** shows that the court has not considered in that judgment nor it was called upon to consider the

provisions of clause (g) of the Rule 238. Therefore, for deciding the question that arises for consideration in the originating summons taken out in this case that judgment is not at all relevant.

17. So far as the submission about res-judicata is concerned, it is obvious for any judgment to operate as res-judicata, there should be decision on merits. So far as decision on Chamber Summons is concerned, the only question that was decided was whether the delay in filing the affidavit is to be condoned for sufficient cause or not. In that chamber summons the question whether the Petitioners should have sought probate of the codicils also could not have been raised and therefore, there is no question of anything said in the order dated 20th August, 2001 operating as res-judicata. It is further to be seen here that the Will and the third codicil are part of the same document. There is no dispute between the parties that all the three codicils are signed by the testator and I find that so far as the first and second codicils are concerned, they are also valid in law, and therefore, there can be no justification for not granting probate of the Will of the testator as modified by the first and second codicils.

18. In the result, therefore, both the Petition and originating summons are disposed of in following terms.

> "It is directed that probate of the Will and first and second codicils be issued in accordance with law."

No order as to costs.

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